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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

AGAPITO RAUL FLORES REYES,

Defendant and Appellant.

2d Crim. No. B209288
(Super. Ct. No. 1084140)
(Santa Barbara County)

Agapito Raul Flores Reyes appeals the revocation of his probation and the imposition of a prison term. He claims there is insufficient evidence to support the trial court's finding that he violated probation. In 2002, appellant was charged with corporal injury to a spouse/cohabitant (Pen. Code, § 273.5, subd. (a) - count 1);¹ false imprisonment by violence (§ 236 - count 2); dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1) - count 3); and criminal threats (§ 422 - count 4). As to count 1, it was alleged that appellant had a prior section 273.5 conviction within seven years of the current offense. (*Id.*, subd. (e).)

On October 16, 2002, appellant entered a plea of no contest to count 1 and admitted the truth of the prior conviction allegation, and the remaining counts were

¹ All further statutory references are to the Penal Code unless otherwise stated.

dismissed. The court suspended the imposition of sentence and placed appellant on five years probation.

In 2008, appellant was deported to Mexico. He returned to the United States and was taken into custody. The court conducted a two-day hearing and found that appellant had violated probation. It revoked probation and sentenced him to five years in state prison. The court imposed a \$1,000 restitution fine and stayed a \$1,000 parole revocation fine. Appellant received 446 days of custody credit. We conclude that substantial evidence supports the trial court's finding that appellant was in violation of probation and affirm.

FACTS

History of Probation Violations

In 2002, following his negotiated plea, appellant was placed on probation. He violated probation twice in 2004 and a third time in 2007. On December 27, 2007, he was advised in court that he must report to probation and keep probation advised of his address, even if he was deported. On January 3, 2008, appellant was transferred into the custody of immigration authorities. They deported appellant and released him in Tijuana.

Appellant's probation officer, Rebecca Mitchell, did not receive any phone calls from him in January 2008, after his deportation. On January 30 she prepared a probation violation report alleging that appellant had violated probation by failing to report. The court summarily revoked probation and issued a warrant for appellant's arrest. On February 19 he re-entered the United States and was apprehended by immigration officers.

Probation Violation Hearing

On May 21 and May 23, 2008, the court held a probation violation hearing. Appellant testified that, on the evening of his deportation (January 3, 2008), he was stopped in Tijuana by two police officers. They asked him about the contents of a yellow envelope he was carrying and appellant responded that they were his deportation papers. The officers grabbed the paperwork, threw it away and took \$70 in cash from him.

Appellant recounted a series of events that deprived him of the ability to work while in Mexico. As a result, he had no income and was unable to purchase a phone card to call the probation department. During his first few days in Mexico, he performed various odd jobs that earned him only enough money to buy food. At night he slept in front of a church or in an abandoned car.

Appellant traveled to his grandmother's home where he found his probation officer's business card that he had left there after a previous deportation. Appellant borrowed money from his grandmother to call the probation officer. However, after he asked for a Spanish-speaking person, he was placed on hold for a long time and the call was disconnected. He had no money to make a second telephone call. For the next month appellant could not obtain employment in the onion fields due to rainy weather.

On February 17, 2008, appellant spoke to his father who asked him if he wanted to return to the United States. His father reached him by contacting appellant's aunt. They arranged for appellant to receive a call at a store that had a telephone. Appellant's aunt loaned him \$500 to buy a ticket to Tijuana. There, appellant met his father and another man who helped him cross the border. He was apprehended by immigration authorities several hours later.

At the instant (May 2008) hearing, appellant acknowledged that he had been informed at the 2002 and 2007 probation violation hearings that he was required to report to his probation officer by mail if he was deported. He conceded that he did not do so. Deputy Probation Officer Patricia Martinez testified that all probationers are informed they must send a letter to the probation department with their current address. Upon receipt of the letter, the probation department sends monthly reports to the probationer. He must send a written response each month. Failure to report results in a warrant being issued for the probationer's arrest.

Martinez also testified that she advised every probationer to take monthly report forms and give them to family members for safekeeping, in the event of deportation. Martinez indicated that all probation department employees who answer the

phones speak Spanish, and all the probation reporting requirements are written in Spanish.

An investigative assistant with the Public Defender's Office testified that appellant could have successfully contacted the probation department by telephone. The investigative assistant called the reception number and asked in Spanish to speak to Mitchell. The Spanish-speaking receptionist transferred the call to Mitchell's voicemail. The recorded message advised that, in an emergency, the caller should call the main number and ask for the officer of the day.

At the conclusion of the hearing, the trial court addressed appellant's difficulties in Mexico, and found that he had violated probation. The court noted that appellant understood the intricacies of the probation system. He was capable of understanding that making a single unsuccessful phone call did not satisfy the reporting requirement. The court observed that appellant had sufficient financial resources to enable him to re-enter the United States, and inferred that he must also have had access to funds to enable him to make a telephone call to the probation department.

DISCUSSION

Appellant contends that the trial court's finding that he violated probation is unsupported by substantial evidence. He claims he faced "extraordinary circumstances" after his arrival in Mexico and there was insufficient evidence to show that he willfully failed to report. Appellant asserts that he lived in complete squalor in January 2008 and a full day's labor was required to purchase a single telephone call. He contends that the trial court's conclusion that he had sufficient resources to cross the border is irrelevant. He re-entered the United States in February, but had no access to funds in January, when he was charged with violating probation.

We apply the substantial evidence standard when reviewing trial court's finding of a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) When faced with a challenge to the sufficiency of the evidence, we determine whether, upon review of the entire record, there is substantial evidence to support the trial court's decision. (*Ibid.*) A probation violation must be proved by a preponderance of the

evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441; *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60.)

Appellant acknowledges that a grant of probation is a privilege, not a right. (See *People v. Rubics* (2006) 136 Cal.App.4th 452, 459.) He admitted at the 2002 hearing that he understood the reporting requirements. He was advised again of these requirements at the hearing in December 2007. Appellant was aware that he was required to report monthly to his probation officer. Although his deportation paperwork was stolen upon his arrival in Tijuana, that does not excuse him from compliance. He had a business card at his grandmother's house, which he used to call the probation department. It can be inferred that the probation department's address was also on the business card. Appellant could have mailed a letter to that address. He admitted on cross-examination that he made no attempt to report by mail.

Appellant's challenge to the trial court's inference concerning his access to funds is meritless. The court did not make a finding that he had monies available in January. Rather, the court inferred that appellant's ability to obtain funds to cross the border in February reflects that he was able to tap some type of financial resource.

Substantial evidence supported the trial court's finding that appellant violated probation by willfully failing to report after deportation.

The judgment (order revoking probation) is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

James F. Rigali, Judge
Superior Court County of Santa Barbara

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

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